IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 174

J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

Appeal from the United States District Court for the District of Columbia

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MOTION TO SUBSTITUTE JAMES P. McGRANERY FOR J. HOWARD McGRATH AND SUPPORTING BRIEF

MOTION TO SUBSTITUTE

On April 7, 1952, J. Howard McGrath resigned as Attorney General of the United States, and on May 27, 1952, James P. McGranery succeeded him. On October 2, 1952,

appellees filed in this Court a motion to substitute Mr. McGranery for Mr. McGrath, requesting that such motion be considered only if the Court deemed its Rule 19(4) to be effective and if Mr. McGranery was not substituted on the Solicitor General's motion. In that motion appellees stated they would, if necessary and at the appropriate time, file another motion to substitute under Rule 25(d) of the Federal Rules of Civil Procedure. Rule 25(d) provides that such a motion may be filed within six months after the successor takes office, which in this case would be November 27, 1952.

Appellees hereby move, pursuant to Rule 25(d), that Mr. McGranery be substituted for Mr. McGrath, and in support thereof allege as follows:

1. Mr. McGranery adopts and continues and threatens to adopt and continue the action of his predecessors in enforcing the Federal Regulation of Lobbying Act.

2. Since taking office on May 27, 1952, Mr. McGranery has done the following things, among others, which show that he considers the Act to be constitutional and adopts and continues the action of his predecessors in enforcing it:

(a) On August 31, 1949, when Mr. McGrath was Attorney General, the United States filed in the United States District Court for the District of Columbia a criminal information in *United States* v. *Robert M. Harriss, et al*, Criminal No. 1212-49, charging four individuals and a corporation with various violations of Sections 305 and 308 of the Act. That information has remained on file to date and therefore has been adopted by Mr. McGranery since he became Attorney General. A certified copy of the information appears in the transcript of record in this case and may be judicially noticed by the Court.

(b) On January 27, 1950, when Mr. McGrath was Attorney General, the United States filed in the district court in the said *Harriss* case a Memorandum of Law in Opposition to the Motions of the Defendants to Dismiss the Informa-

tion, which memorandum asserts that the Act is constitutional in all respects. That memorandum has remained on file to date and therefore has been adopted by Mr. McGranery since he became Attorney General. A certified copy of the memorandum appears in the transcript of record in this case and may be judicially noticed by the Court.

3. Since taking office on May 27, 1952, Mr. McGranery has done the following things, among others, which show that like his predecessors he construes Section 305 of the Act to apply to "every person receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of federal legislation, without any regard whatsoever to the requirements of Section 307 confining the applicability of the entire statute to a person who "receives money . . . to be used principally to aid, or the principal purpose of which person is to aid" in influencing the passage or defeat of federal legislation, and that therefore he like his predecessors construes the Act as applicable to appellees:

(a) The criminal information in the *Harriss* case (referred to in ¶2(a) above) alleges among other things in ¶8 thereof:

> That from and after August 2, 1946, under the provisions of the Federal Regulation of Lobbying Act it has been the duty of every person receiving any contributions or expending any money, for the purpose of influencing directly or indirectly the passage or defeat of any legislation by the Congress of the United States, to file with the Clerk of the House of Representatives between the first and tenth day of each calendar quarter a statement under oath . . . as prescribed in Section 305 of the said Federal Regulation of Lobbying Act . . .

Mr. McGranery has adopted this criminal information as his own and therefore it reflects his interpretation of the Act. Since it was filed when Mr. McGrath was Attorney

General and has now been adopted by Mr. McGranery, it shows that Mr. McGranery adopts the same interpretation as Mr. McGrath.

(b) The memorandum of law filed in the *Harriss* case (referred to in ¶2(b) above) states among other things at pp. 41-44 thereof:

> It is seriously contended especially by the defendant Harriss that Section 307 was intended by Congress to restrict and limit the application of the entire Lobbying Act . . . It is submitted that Section 307 cannot be so interpreted . . .
>
> A careful analysis of the language of Section 307 clearly indicates that it is not a language of restriction . . . If Congress had intended to make Section 307 the limitation provision of the statute, express words of restriction could have been used . . .
>
> For example, if Section 307 limits the application of the entire lobbying act only to those who solicit, collect, or receive money, etc., what about Section 305 where persons *expending* money are also required to file reports? Also what about Section 305(a) (4, 5, 6) which provides for reporting of expenditures? Must those provisions also be nullified? . . .
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> * * *
>
> What then was the purpose of Section 307? What construction can be given to it which can possibly be reconciled with the other provisions of the statute? It is submitted that Section 307 simply makes explicit as to a specified category of persons to which the act may be applicable and which category can only be implied from paragraphs 1 and 2 and 3 of Section 305(a), which on their face may apply impliedly to many categories. For example, paragraphs 1, 2 and 3 of Section 305 require all categories of persons to report contributions made to or for such persons during the calendar year, etc. Although these paragraphs do not specifically mention contributions received directly or through an agent or employee, such coverage can clearly be implied from the use of the terms "to or for". (See Sections 305, Subsection (a), paragraphs 2 and 3). What Section

307 does then is to make it clear that one of the categories unquestionably implied in those provisions of Section 305, namely those who through any agent or employee directly and indirectly solicits, collects or receives money to be used principally for lobbying purposes, is expressly included.

* * *

Indeed, the legislative history indicates that Section 308 for example was meant to be a separate and distinct provision. Section 308 in substance was the Black Bill of 1936, and was enacted to accomplish the intent of Congress with respect to a disclosure of the identity of professional lobbyists and the source of their income. Similarly, Section 305 is the Smith Bill of 1936, and was enacted to accomplish the intent of Congress with respect to the disclosure of pressure groups and their sources of income. As already indicated supra, Congress had two paramount purposes in enacting the Lobbying Act:

(1) The disclosure of pressure groups and their sources of income. These are provided for in the reporting Sections 303, 304 and 305 of the lobbying act.

(2) The identity of professional lobbyists and sources of their income. This is Section 308 of the same Act.

That memorandum has been adopted by Mr. McGranery as his own since he became Attorney General and therefore reflects his interpretation of the statute. Since the memorandum was filed when Mr. McGrath was Attorney General and has now been adopted by Mr. McGranery, it shows that Mr. McGranery adopts the same interpretation of the Act as Mr. McGrath.

(c) This construction thus adopted by Mr. McGranery is also the same as that contended for in the Memorandum in Opposition to the Motion of Defendant to Dismiss the Indictment (pp. 44-47) filed by the United States on March 18, 1949, in *United States* v. *Roger C. Slaughter*, Criminal No. 1433-48 (now closed), in the United States District

Court for the District of Columbia. That memorandum was filed when predecessor Tom C. Clark was Attorney General and was later adopted by predecessor McGrath. A certified copy of the memorandum is contained in the transcript of record in this case and may be judicially noticed by the Court. This shows that Mr. McGranery has adopted the same construction of the statute as his predecessors.

(d) The construction of the statute adopted by Mr. McGranery in the *Harriss* information and memorandum is also the same as that asserted in Defendant's Memorandum in Support of Motion for Summary Judgment (pp. 12-14) filed in the instant case on June 6, 1949, when predecessor Tom C. Clark was Attorney General, and the same as that asserted in Defendant's Trial Brief (pp. 76-81) filed in the instant case on November 9, 1951, when predecessor J. Howard McGrath was Attorney General. Copies of the above-mentioned memorandum and brief in the instant case are included in the transcript of record herein and may be judicially noticed. This shows that Mr. McGranery has adopted the same construction of the Act as his predecessors.

(e) The criminal information and memorandum in the *Harriss* case, which have been adopted by Mr. McGranery, show that he construes the statute as applicable to "every person receiving any contributions or expending any money" for the purpose of influencing the passage or defeat of federal legislation. The complaint in the instant action (which appears in the transcript of record herein) alleges that one of the more general objectives of appellees is "the support of legislation in furtherance of [the principles of individual liberty and ownership of property] and opposition to legislation in derogation thereof", and that appellees carry out this objective as well as their many other objectives by methods which involve the expenditure of money (Pars. 1(a)(2), 1(d)(2)). Consequently the con-

struction of the Act adopted by Mr. McGranery renders it applicable to appellees on the basis of the allegations in their complaint herein.

4. Hearing on the motions to dismiss in the *Harriss* case, which among other things assert unconstitutionality of the statute, has been postponed in the United States District Court for the District of Columbia, with the consent of the United States, from the time Mr. McGranery took office to date, on the ground that the ruling of the Supreme Court in the instant suit may be controlling in that case. This action on the part of Mr. McGranery shows that he adopts the same views as his predecessors with respect to the construction and constitutionality of the Act and continues the action of his predecessors in enforcing the Act.

5. Mr. McGranery has moved that he be substituted and be allowed to appeal in the instant case if such is necessary. The assignments of error made herein reflect the same position which his predecessors have taken throughout this case. Such action shows that he intends to continue enforcement of the statute, and adopts the views of his predecessors with respect to the constitutionality, interpretation, and applicability of the Act.

6. Mr. McGranery considers the Act to be constitutional and adopts the same construction of it as his predecessors.

7. Mr. McGranery considers the Act valid and applicable to appellees, and will continue in the course of his predecessors in enforcing the Act against appellees unless he is enjoined from doing so.

BRIEF IN SUPPORT OF MOTION TO SUBSTITUTE

All of the facts alleged in the above motion are subject to judicial notice and incontrovertible, with the exception of certain of the allegations in paragraphs 4 and 7. We have not filed supporting proof for those allegations because we do not know whether they will be denied. If they are,

and if the Court deems further proof necessary, we request the opportunity to submit such proof.

The facts alleged—even those which are subject to judicial notice and indisputable—are clearly sufficient to warrant substitution under Rule 25(d). The district court found that predecessor Tom C. Clark threatened plaintiffs with criminal prosecutions if they failed to comply with the statute (Findings of Fact, Paragraph 7). The district court also found that predecessor J. Howard McGrath had adopted and continued this enforcement policy and therefore should be substituted pursuant to Rule 25(d) (Findings of Fact, Paragraph 9). The allegations above demonstrate that Mr. McGranery has adopted the same views as his predecessors with respect to the interpretation, applicability and constitutionality of the statute and is continuing to enforce the statute. Those allegations bring the matter directly within the requirements of Rule 25(d), and in fact more than satisfy that Rule.

Rule 25(d) provides that:

> Substitution pursuant to this Rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States.

It is clear that the Rule does not require the same showing as may be necessary in instituting the suit against the original defendant. Where a threat of enforcement by the original defendant has once been shown, as it has been here, it is necessary only to show that the successor continues "the action of his predecessor in enforcing [the] law." It is not necessary to show that the successor formally and expressly repeated the threat to the plaintiffs. Such a requirement would emasculate the Rule. Any successor could avoid continuation of the action by the simple device of refraining from formally repeating the threat. This would give the successor the option of abating the action

merely by remaining silent, although as here his enforcement policy remains the same as that of his predecessor and therefore in actual fact the threat to appellees remains precisely the same as before.

That this is the proper construction of the Rule is demonstrated not only by its terms but also by its history. Dean Charles E. Clark, a member of the Advisory Committee on the Federal Rules of Civil Procedure, speaking of the purpose of the sentence quoted above, said (Fed. Rules of Civ. Procedure and Proceedings of the A.B.A. Institute, Cleveland (1938), p. 267):

> The next sentence is an attempt to get away from the effect of one case, *Ex parte La Prade* (289 U.S. 444, 77 L. ed. 1311, 53 Sup. Ct. 682 (1933)), to provide that when the new officer comes in and has taken essentially the same position, substitution may then be made in the original action. Under the case, if an injunction was brought against public officer, X, to enjoin him from carrying out a statute claimed to be unconstitutional, and he should go out of office, the suit would not be in form to continue against the new public officer, Y, so we here provide: "Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States."

Even the *Ex parte La Prade* case referred to by Dean Clark did not hold that a specific threat by the successor is necessary for substitution. It held only that reliance may not be placed solely on the fact that it is the duty of the successor to enforce the statute. Thus the Court there said (289 U.S. at 458):

> Plaintiffs did not allege that petitioner threatened or intended to do anything for the enforcement of the statute. The mere declaration of the statute that suits for recovery of penalties shall be brought by the attorney general is not sufficient. Petitioner might hold, as plaintiffs maintain, that the statute is unconstitu-

> tional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.

The incontrovertible allegations in the instant case demonstrate, however, that Mr. McGranery both intends to enforce the statute and considers it constitutional. Consequently even the *La Prade* rule is fully satisfied here.

This construction of the Rule is further supported by the decision of this Court in *Allen* v. *Regents*, 304 U.S. 439. There the Regents had brought a personal action to restrain the Collector of Internal Revenue from enforcing a tax statute on the ground that it was inapplicable or unconstitutional. Pending review a new Collector took office. The application for substitution alleged only that the Collector of Internal Revenue had established a policy of applying the tax statute to situations of the kind involved in that case, that the policy was binding on all Collectors, and that therefore the new Collector "adopts the attitude of his predecessor and will proceed to enforce said policy."* There

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* The full text of the application for substitution taken from the record in that case is as follows:

Come now Regents of the University System of Georgia, appellee in this case, and respectfully show to the Court the following:

1. Within six months next preceding the filing of this application the appellant herein, W. E. Page, has departed this life.

2. Marion H. Allen has been appointed Collector of Internal Revenue of the Atlanta, Georgia, District, and is now fulfilling his duties as such.

3. Appellee desires, pursuant to 28 U. S. C. #780, to substitute Marion H. Allen in place of W. E. Page.

4. Appellee further shows that the policy of attempting to enforce the Federal Amusements Tax on admissions charged to athletic contests given by appellee is a policy established by the Commissioner of Internal Revenue, and is under departmental practices and regulations binding on all Collectors.

5. Appellee therefore says that Marion H. Allen is required to follow said policy, and hence adopts the attitude of his predecessor and will proceed to enforce said policy with respect to applying the Federal Amusements Tax to the said admissions.

was no allegation of any specific, separate, and direct threat by the successor. Over the objection of the successor, the Supreme Court held that substitution was warranted under Section 11 of the Judiciary Act of 1925 (from which Rule 25(d) was taken) and said (p. 445):

> The motion to substitute the petitioner asserted that, unless restrained, he would continue in the course pursued by his predecessor. The answer did not deny this allegation but relied upon the claim that the present Collector is not privy to the acts of the former one. In *Ex parte La Prade*, 289 U.S. 444, this court reserved the question whether in such a situation the successor might be substituted. As the present case is within the letter of the Act and within the inconvenience intended to be obviated by its adoption, the substitution was properly permitted.

Certainly the indisputable facts set forth in the motion above are more than adequate to warrant substitution under this ruling in the *Regents* case.

We further submit that the facts alleged above—even those which are incontrovertible and which may be judicially noticed—are not only enough to satisfy the requirements of Rule 25(d), but would even be enough to warrant the bringing of an action against Mr. McGranery as an original defendant. Those facts demonstrate that he adopts the same views as his predecessors with respect to interpretation and constitutionality, considers the Act to be both applicable to appellees and valid, and is enforcing it. This Court has in a number of cases either expressly or impliedly held that under such circumstances, where the law enforcement officer has taken the position that a statute is both constitutional and applicable to a party, that party may sue to enjoin enforcement without any showing of a specific, direct, melodramatic threat.

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* (cont'd) Wherefore, appellee prays that the said Marion H. Allen be substituted in place of the said W. E. Page, herein, and the Court permit this cause to be continued and maintained with the said successor in office so substituted.

For example, in *Currin* v. *Wallace*, 306 U.S. 1, affirming *Wallace* v. *Currin*, 95 F. 2d 856 (C.C.A. 4), and reversing *Currin* v. *Wallace*, 19 F. Supp. 211 (E.D. N.C.), tobacco warehousemen brought suit for declaratory relief and injunction against enforcement of the Federal Tobacco Inspection Act on the ground that it was unconstitutional. The Act authorized the Secretary of Agriculture to designate tobacco markets at which the Act was to apply, and thereafter no tobacco was to be sold at those markets until inspected and certified by his representatives. The warehousemen instituting the action did business at one of the markets so designated. It was clear that the enforcement officials considered the Act constitutional, and also that the Act was applicable to the warehousemen who brought the action. No reference was made in any of the opinions to any specific, direct threat to prosecute those particular warehousemen if they violated the Act. Nevertheless, both the Court of Appeals and this Court held that they had standing to bring the action.

In *Euclid* v. *Ambler Co.*, 272 U.S. 365, a land owner brought suit to enjoin enforcement of a local zoning ordinance enforceable by criminal penalties on the ground that it was unconstitutional. Plaintiff alleged only that the ordinance was being enforced in accordance with its terms and that its mere existence and threatened general enforcement destroyed the marketability of his land. There was no allegation of a specific threat to prosecute plaintiff for violation of the statute. A motion to dismiss was made in the trial court on the ground that the suit was premature because plaintiff had made no effort to obtain a building permit or to apply to the zoning board for relief as permitted by the ordinance. The Supreme Court held that the motion was properly overruled and said (p. 386, emphasis supplied):

> The effect of the allegations of the bill is that the ordinance of its own force operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses;

> and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, *the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it.* Under these circumstances, the equitable jurisdiction is clear.

Carter v. *Carter Coal Co.*, 298 U.S. 238, involved suits to enjoin enforcement of the Bituminous Coal Conservation Act of 1935. The Act imposed a 15% tax on the sale of all bituminous coal with a 90% drawback to producers who accepted the code provisions promulgated under the Act. Suits to enjoin enforcement of the Act were brought before formulation of the code, and of course before any specific threat to enforce the Act or the code. The Supreme Court rejected the contention that the suits were premature, saying (p. 287):

> That the suits were not prematurely brought also is clear. Section 2 of the Act is mandatory in its requirement that the commission be appointed by the President. The provisions of Section 4 that the code be formulated and promulgated are equally mandatory. The so-called tax of 15% is definitely imposed, and its exaction certain to ensue.

To the same effect are *Pierce* v. *Society of Sisters*, 268 U.S. 510, and *Adams* v. *Tanner*, 244 U.S. 590, where suits to enjoin enforcement were brought before the statutes became effective and therefore before there could have been any specific threat to enforce them against the complaining parties.

Similarly, the lower federal courts have frequently held that it is enough if the law enforcement officer has taken the position that the statute is valid and applicable to plaintiffs, and there is no need to show a specific and direct threat to institute proceedings. *Black* v. *Little*, 8 F. Supp. 867 (E.D. Mich., 1934), cited with approval in *Gully* v. *Interstate Natural Gas Co.*, 82 F. 2d 145, 149 (C.C.A. 5),

cert. den. 298 U.S. 688; *Chester C. Fosgate Co.* v. *Kirkland*, 19 F. Supp. 152 (S.D. Fla., 1937); *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60 (D. Idaho 1941); see also Borchard, *Declaratory Judgments* (2d ed.), pp. 43, 62, 276, 966.

We submit therefore that the facts alleged in the motion —even those which are incontrovertible and may be judicially noticed—clearly demonstrate that substitution under Rule 25(d) is warranted here. Those facts show beyond question that Mr. McGranery adopts and continues the action of his predecessors in enforcing the Lobbying Act, which is all that the Rule requires. Moreover, those facts show that he has adopted precisely the same views as his predecessors with respect to the constitutionality, applicability, and interpretation of the statute, is continuing to enforce the Act, and believes it to be applicable to appellees and valid. Under the decided cases this is not only enough to warrant substitution under the provisions of Rule 25(d) but would even support the institution of an action against Mr. McGranery initially.

For these reasons it is submitted that this motion to substitute Mr. McGranery for Mr. McGrath should be granted.

Respectfully submitted,

Carl McFarland,
Ashley Sellers,
Raymond S. Smethurst,
Kenneth L. Kimble,
Counsel for Appellees.

October 1952.

Office - Supreme Court, U.S.
FILED
OCT 28 1952
HAROLD B. WILLEY, Clerk

No. 174

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Appeal from the United States District Court for the District of Columbia

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PETITION FOR REHEARING

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

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